

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOANNE K. LIPSON, individually
and as personal representative of the
Estate of James B. Turner,

Plaintiffs,

v.

ON MARINE SERVICES
COMPANY, LLC, FERRO
ENGINEERING DIVISION,

Defendant.

C13-1747 TSZ

ORDER

THIS MATTER comes before the Court on Defendant ON Marine Services Company, LLC's ("ON Marine") motions in limine, docket no. 114, and Defendant Lone Star Industries, Inc.'s ("Lone Star") motions in limine, docket no. 139-1.¹ Defendants moved to exclude or limit the testimony of three of Plaintiffs' expert witnesses: (1) Dr. William Longo, Ph.D., Plaintiffs' material science expert, (2) Dr. Carl Andrew Brodtkin,

¹ During trial, Lone Star settled with Plaintiffs and was dismissed as a party. The Court will therefore not address Lone Star's motions in this Order except to the extent that any of Lone Star's arguments were joined by ON Marine or relate to Plaintiffs' remaining claims against ON Marine.

1 M.D., Plaintiffs' occupational health expert, and (3) Susan Raterman, Plaintiffs'
2 industrial hygiene expert. The Court previously denied the motions with respect to each
3 expert, see docket nos. 243 and 250, and now enters the following Order explaining its
4 reasoning.

5 **Background**

6 The parties are familiar with the facts of the case and they will be stated only
7 briefly for purposes of this Order. Plaintiff James B. Turner, along with his wife Joanne
8 K. Lipson (collectively, "Plaintiffs"), brought suit against Defendants for Mr. Turner's
9 alleged exposure to asbestos-containing products manufactured or distributed by
10 Defendants. Mr. Turner alleged that he was directly exposed to asbestos through Ferro
11 hot tops and Ferroboard liners, asbestos-containing products manufactured by ON
12 Marine, during Mr. Turner's employment with Bethlehem Steel from 1973 to 1976.

13 **Discussion**

14 **A. Standard of Review**

15 Under Rule 702 of the Federal Rules of Evidence, an expert witness, "qualified . . .
16 by knowledge, skill, experience, training, or education," may testify if: "(a) the expert's
17 scientific, technical, or other specialized knowledge will help the trier of fact to
18 understand the evidence or to determine a fact in issue; (b) the testimony is based on
19 sufficient facts or data; (c) the testimony is the product of reliable principles and
20 methods; and (d) the expert has reliably applied the principles and methods to the facts of
21 the case." Fed. R. Evid. 702. The Court has broad discretion concerning the
22
23

1 admissibility or exclusion of expert testimony. Wood v. Stihl, Inc., 705 F.2d 1101, 1104
2 (9th Cir. 1983).

3 A trial judge has the “task of ensuring that an expert’s testimony both rests on a
4 reliable foundation and is relevant to the task at hand.” Daubert v. Merrell Dow
5 Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993). The party presenting the expert, the
6 Plaintiffs in this case, “must show that the expert’s findings are based on sound science,
7 and this will require some objective, independent validation of the expert’s
8 methodology.” Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II), 43 F.3d
9 1311, 1316 (9th Cir. 1995).

10 The Court’s inquiry as to relevance and reliability is subject to no set list of
11 factors. See Kumho Tire v. Carmichael, 526 U.S. 137, 141-42 (1999). “For scientific
12 opinion, the court must assess the reasoning or methodology, using as appropriate such
13 criteria as testability, publication in peer reviewed literature, and general acceptance, but
14 the inquiry is a flexible one.” Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010).
15 “The district court has discretion whether to hold a Daubert hearing in determining
16 whether to admit expert testimony.” Millenkamp v. Davisco Foods Int’l, Inc., 562 F.3d
17 971, 979 (9th Cir. 2009).

18 The Court’s focus is on the expert’s methodology, not his or her conclusion.
19 Metabolife Intern., Inc. v. Wornick, 264 F.3d 832, 841 (9th Cir. 2001). Once the Court
20 has assured itself that the expert’s testimony “rests on a reliable foundation and is
21 relevant to the task at hand,” its gatekeeping function is satisfied. Daubert, 509 U.S. at
22 597. Because the trial court is “a gatekeeper, not a fact finder” United States v.
23

1 Sandoval-Menxoza, 472 F.3d 645, 654 (9th Cir. 2006), “[s]haky but admissible evidence
2 is to be attacked by cross examination, contrary evidence, and attention to the burden of
3 proof, not exclusion,” Primiano, 598 F.3d at 564.

4 **B. Dr. William Longo, Ph.D.**

5 Defendants seek to limit the testimony of Dr. William Longo, Plaintiffs’ material
6 science expert, and to exclude Dr. Longo’s video demonstrations using Tyndall lighting.
7 The Court has reviewed the briefs and supporting materials filed by the parties, including
8 the declaration of Dr. Longo, and finds that a Daubert hearing is unnecessary.

9 Defendants do not challenge Dr. Longo’s qualifications as an expert, and the Court
10 finds that he is qualified to testify. Dr. Longo has a bachelor’s degree in microbiology, a
11 master’s degree in engineering, and a doctorate degree in material science and
12 engineering. Declaration of William Longo, docket no. 165, at ¶ 3.

13 Furthermore, the Court finds that Dr. Longo’s testimony will assist the jury in
14 understanding the evidence and that Dr. Longo’s opinions are relevant and reliable. Lone
15 Star argues that Dr. Longo should be precluded from testifying about his work practice
16 simulations because (1) his test chamber does not replicate conditions similar to Mr.
17 Turner’s work environment, and (2) Dr. Longo uses an unreliable method of calculating
18 asbestos dust concentrations. Lone Star’s motions in limine, docket no. 139-1, at 14.

19 Lone Star’s first argument goes to the weight, rather than the admissibility, of
20 Dr. Longo’s testimony. The test must be “conducted under conditions substantially
21 similar to the actual conditions.” Champeau v. Fruehauf Corp., 814 F.2d 1271, 1278 (8th
22 Cir. 1987). In general, dissimilarities between testing conditions and actual conditions
23

1 “affect the weight of the evidence, not its admissibility.” Id. Here, it would not be
2 possible for Dr. Longo to test release of asbestos in actual working conditions for obvious
3 reasons. Defendants can challenge the weight of this testimony on the basis that the
4 testing chamber is dissimilar to Mr. Turner’s actual working conditions.

5 With regard to methods of calculating asbestos dust concentrations, Lone Star
6 asserts that Dr. Longo’s methods are unreliable. Lone Star’s motions in limine at 19.
7 However, Dr. Longo states that his opinions in this case rely only upon the widely
8 accepted NIOSH 7400 and NIOSH 7402 methods, not the “indirect” method challenged
9 by Lone Star. Longo Decl. at ¶ 46. The Court finds that Dr. Longo’s methodologies are
10 reliable and the motion to exclude or limit the testimony of Dr. Longo is DENIED.

11 Defendants also seek to exclude any of Dr. Longo’s video demonstrations using
12 Tyndall lighting, which illuminates the presence of dust. The Court, having viewed the
13 edited video offered by Plaintiffs, finds that the video is relevant and that its probative
14 value is not substantially outweighed by the danger of undue prejudice. Defendants
15 argue that the video should be excluded under Fed. R. Evid. 403 because it lacks
16 probative value, exaggerates the appearance of dust, and is made to inject shock value
17 that will mislead the jurors and cause unfair prejudice to Defendants. Lone Star’s
18 motions in limine at 23; ON Marine’s motions in limine, docket no. 114, at 22. The
19 video has been edited to minimize any appearance of protective gear worn by the test
20 conductor, rendering Defendants’ concerns on that issue moot. Furthermore, the video is
21 not shocking or confusing, and Defendants’ arguments regarding the exaggeration of the
22 appearance of dust would be appropriate arguments in challenging the weight of the
23

1 video. The Court holds that the video is admissible and Defendants' motions are
2 DENIED.

3 **C. Dr. Carl Andrew Brodtkin, M.D**

4 Dr. Carl Andrew Brodtkin, M.D., is Plaintiffs' occupational health expert and is
5 prepared to offer medical causation testimony in support of Plaintiffs' claims. The Court
6 has reviewed the briefs and supporting materials filed by the parties, including the
7 declaration of Dr. Brodtkin, as well as Dr. Brodtkin's deposition testimony, and finds that
8 a Daubert hearing is unnecessary. The Court finds that Dr. Brodtkin's testimony will
9 assist the jury in understanding the evidence and that Dr. Brodtkin's opinions are relevant
10 and reliable.

11 The Court finds Dr. Brodtkin to be qualified to testify as an expert on the matters
12 addressed in his deposition. Dr. Brodtkin is a licensed physician who has specialized in
13 occupational and environmental medicine for over 20 years. Declaration of Carl Andrew
14 Brodtkin ("Brodtkin Decl."), docket no. 168-1, at ¶ 2. Dr. Brodtkin has a bachelor's degree
15 in biology, a medical degree, and a master's degree in public health. Brodtkin Curriculum
16 Vitae, Brodtkin Decl. Ex. A. In addition, he has completed post-graduate training in
17 internal medicine, occupational medicine, and environmental medicine. Id. Dr. Brodtkin
18 has authored numerous articles relating to asbestos-exposed workers. Id. Furthermore,
19 Dr. Brodtkin participated as a co-investigator of the Caret Study, involved with studying a
20 group of asbestos-exposed workers. Deposition of Dr. Brodtkin on October 18, 2013
21 (Brodtkin Dep.) at 20:1-21:11.

1 Defendants' primary challenge to Dr. Brodkin's testimony is that Dr. Brodkin will
2 testify that every exposure to asbestos was a cause of Mr. Turner's injuries. Lone Star's
3 motion in limine at 3; ON Marine's motion in limine at 9. The Court struck this motion
4 as moot because Plaintiffs agreed that Dr. Brodkin would not present such testimony.
5 Minute Order, docket no. 197. At oral argument, Defendants asserted that Dr. Brodkin's
6 opinions are nevertheless an "every fiber" opinion in disguise. However, in his
7 deposition Dr. Brodkin was specifically asked if he would testify that "exposure to one
8 fiber increases a person's risk of getting mesothelioma," to which Dr. Brodkin replied
9 "No. That has never been my opinion." Brodkin Dep. at 107:19-22. During trial
10 Dr. Brodkin did not testify that exposure to every fiber of asbestos caused Mr. Turner's
11 injury.

12 Dr. Brodkin does opine that each "identified exposure" was a substantial cause of
13 Mr. Turner's injury. Dr. Brodkin states that an "identified exposure," distinct from "any
14 exposure," requires "(1) a known source of asbestos exposure, and (2) a well-
15 characterized activity, that (3) disrupts the source to generate airborne fibers, sufficient to
16 overcome the body's respiratory defenses, which (4) adds to the body's burden of
17 asbestos." Brodkin Decl. at ¶ 9. Dr. Brodkin set forth Mr. Turner's "identified
18 exposures" to refractory cement, hot-top residue, and through laundering insulation-
19 contaminated clothing. Id. In formulating his opinions in this case, Dr. Brodkin
20 interviewed and examined Mr. Turner and evaluated the testimony of Mr. Turner's co-
21 workers and family to identify and assess Mr. Turner's biologically significant
22 "identified" exposures. Id. at ¶ 8.

1 Dr. Brodkin uses the Helsinki Criteria for diagnosis of asbestos-related disease.
2 Id. at ¶ 8. The Helsinki Criteria has been published and according to Dr. Brodkin
3 represents the “accepted evidence relied upon by physicians in [his] field,” id., and
4 Defendants have not challenged the use of that methodology. The Court is satisfied that
5 Dr. Brodkin’s opinions are based on a sound methodology and are not simply unreliable
6 opinions equivalent to “every fiber in disguise.”

7 At oral argument, Defendants also argued that Dr. Brodkin will testify that all
8 exposures are cumulative even though there is no medical support for how many
9 exposures cause mesothelioma. In his deposition, Dr. Brodkin was asked for the lowest
10 level of exposure that has resulted in a case of mesothelioma. Brodkin Dep. at 139:19-
11 140:15. Dr. Brodkin replied that “there isn’t a bright line level” or “threshold at which I
12 or anyone else can say one is safe or not going to develop mesothelioma below that
13 level.” Id. At oral argument, Plaintiffs’ counsel argued that this “low level” issue is
14 irrelevant to the facts of this case, because Mr. Turner was exposed to very high levels of
15 asbestos through sustained and frequent exposure, and that there is no dispute Mr. Turner
16 was exposed to asbestos or has an asbestos-related disease. The Court concludes that
17 Dr. Brodkin’s inability to identify a low threshold or bright line level goes to the weight,
18 not the admissibility, of his testimony.

19 Defendants’ final challenges to Dr. Brodkin’s testimony are based on his reliance
20 on certain non-peer reviewed materials as well as the lack of direct evidence of specific
21 products to which Mr. Turner was exposed. Whether a reference material is peer-
22 reviewed is one factor the Court will consider in determining reliability, but it is not
23

dispositive. Moreover, Mr. Turner's exposure could be proven without direct evidence. See Lockwood v. AC&S, Inc., 109 Wn.2d 235 (1987) (setting forth factors courts should consider when determining whether there is sufficient evidence for a jury to find causation has been established). These arguments are appropriate topics for cross-examination of Dr. Brodkin, as they go to the weight, not the admissibility, of his testimony.

The Court holds that Dr. Brodkin is qualified to testify as an expert in this case. Furthermore, the Court finds that Dr. Brodkin's opinions are reliable and relevant to this case. Defendants' motion to limit or exclude the testimony of Dr. Brodkin is DENIED.

D. Susan Raterman

Defendants seek to limit the testimony of Susan Raterman, Plaintiffs' industrial hygiene expert. The Court has reviewed the briefs and supporting materials filed by the parties, including the declaration of Ms. Raterman, and finds that a Daubert hearing is unnecessary. The Court finds that Ms. Raterman's testimony will assist the jury in understanding the evidence and that Ms. Raterman's opinions are relevant and reliable.

Defendants do not challenge Ms. Raterman's qualifications as an expert, and the Court finds that she is qualified to testify. Ms. Raterman has a bachelor's degree in biology and a master's degree in environmental health engineering. Declaration of Susan Raterman ("Raterman Decl."), docket no. 169-1, at ¶ 3. She is certified in the Comprehensive Practice of Industrial Hygiene and has worked as a professional industrial hygienist for thirty-four years. Id.

1 Lone Star challenges Ms. Raterman's testimony on the grounds that she employed
2 no methodology, cannot quantify Mr. Turner's exposure to asbestos, has no formula for
3 reducing exposure levels to determine bystander levels, and has no support for her
4 assertion that every exposure causes mesothelioma. Lone Star's motions in limine at 26-
5 27. Ms. Raterman's methodology is to conduct a multi-step exposure assessment. See
6 Raterman Decl. at ¶¶ 9 – 13. This methodology is generally accepted within the
7 industrial hygiene community. Id. at ¶ 13. Ms. Raterman will not provide a
8 quantification of Mr. Turner's exposure to asbestos and is critical of dose analysis that
9 attempts to do so. Id. at ¶ 21. Ms. Raterman's inability to quantify Mr. Turner's dose
10 and lack of quantifiable formula goes to the weight, not the admissibility, of Ms.
11 Raterman's opinions. Finally, Ms. Raterman states that she will not offer opinions on
12 medical causation and therefore Lone Star's "every exposure" concern is unfounded. See
13 id. at ¶ 19. Lone Star's motion is DENIED.

14 ON Marine seeks to preclude Ms. Raterman from testifying that Mr. Turner was
15 exposed to an asbestos-containing Ferro product at Bethlehem Steel, arguing that her
16 opinions are based on speculation. ON Marine's motions in limine at 17. This argument
17 goes to the weight, not the admissibility, of Ms. Raterman's testimony. Ms. Raterman's
18 opinions are based on the testimony of Mr. Turner as well as discovery documents
19 detailing sales of Ferro products to Bethlehem Steel. Raterman Decl. at ¶ 13. The Court
20
21
22
23

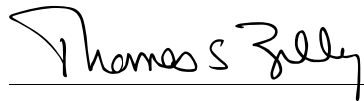
1 finds that Ms. Raterman's opinions are not within the realm of guesswork and
2 speculation and therefore ON Marine's motion is DENIED.²

3 **Conclusion**

4 For the foregoing reasons, the Court denied Defendants' motions in limine to
5 exclude or limit the testimony of Plaintiffs' experts Dr. William Longo, Dr. Carl Brodtkin,
6 and Ms. Susan Raterman. See docket nos. 243 and 250. The Court finds that Dr. Longo,
7 Dr. Brodtkin, and Ms. Raterman are qualified to testify as expert witnesses, will assist the
8 trier of fact in understanding the evidence, and will provide relevant and reliable
9 opinions. Furthermore, having now heard the testimony offered by all three witnesses at
10 trial, the Court remains satisfied that it was fully informed through the briefs and
11 materials filed by the parties and that a Daubert hearing was not necessary in assessing
12 the admissibility of the expert testimony.

13 IT IS SO ORDERED.

14 Dated this 13th day of December, 2013.

15
16 

17 THOMAS S. ZILLY
18 United States District Judge
19
20

21 ² ON Marine also challenges the scientific basis behind Ms. Raterman's opinion that amosite asbestos
22 fibers remain after heating. The Court has addressed this argument, as well as the admissibility of the
23 materials upon which Ms. Raterman relies, in a separate order. See Minute Order, docket no. 260.